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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1637

IN THE MATTER OF THE PETITION OF CANAL BARGE COMPANY, INC., AS OWNER OF THE M/V ELAINE JONES, PRAYING FOR EXONERATION FROM OR LIMITATION OF LIABILITY

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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The judgment and opinion of the United States District Court for the Northern District of Mississippi, Greenville Division, is reported at 323 F. Supp. 805; the judgment and opinion of the United States Court of Appeals, Fifth Circuit, is reported at 408 F.2d 11; the judgment and opinion of the United States Court of Appeals, Fifth Circuit, on Petition for Rehearing, is reported at 408 F.2d 34, and the final judgment and opinion of the Fifth Circuit is reported at 513 F.2d 911.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on March 30, 1973. Rehearing was denied on June 18, 1973, but mandate was stayed pending a decision in *Johnson v. Penrod*, 510 F.2d 234 (1975), and final opinion issued May 16, 1975. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1), pursuant to

which Canal Barge Company, Inc. filed its Petition for a Writ of Certiorari.

STATEMENT OF THE CASE

This action for wrongful death arises from the October 14, 1969, collision between the M/V ELAINE JONES, owned and operated by petitioner, Canal Barge Company, Inc., and an arch of the Eads Bridge spanning the Mississippi River at St. Louis, Missouri, and connecting East St. Louis, Illinois, with the City of St. Louis.

The collision damages and almost simultaneous death of pilot, George L. Griffith, were precipitated by a combination of bizarre incidences, chief among these was the sudden and unexpected rise of the Mississippi River at St. Louis Harbor which had been occasioned by an unexpected and unprecedented rainfall. A left set or cross-current is encountered in that vicinity only by down-bound vessels and only in periods of high water. The captain of the ELAINE JONES, Vernon Stroschein, was the only wheelman aboard that knew of and had previously encountered this left set.

For reasons best known only to themselves, Captain Stroschein and Earl Ray Daily, Canal's port captain, who was in twice daily radio contact with the ELAINE JONES failed to apprise pilot Griffith of the left set or the proper means of navigating in order to avoid it. Further, at the time pilot Griffith assumed the watch and relieved Captain Stroschein, he inquired of the Captain concerning the idiosyncrasies of the tow as

made up. However, due apparently to Stroschein's limited experience with the tow as then made up he was unable to reply to pilot Griffith's query.

During the intervening twenty-five minutes from the time pilot Griffith assumed the watch until the collision with the Eads Bridge, Captain Stroschein did not inform his pilot of the hazardous left set of which he had knowledge, nor did he instruct Griffith as to the proper method of navigating St. Louis Harbor and thereafter failed to take charge of the vessel when the pilot was clearly making an approach that did not make allowances for the left set.

Prior to the collision with the Eads Bridge, but subsequent to the collision with the Veterans Bridge, Captain Stroschein, apprehensive of the possibility of the loss of his own life or limb, abandoned pilot Griffith in the wheelhouse of the ELAINE JONES and sought the safety afforded on the vessel's stern.

On the day before, the day of, and the day after the collision, when the river was higher, many other boats of the same and lesser sizes and horsepower as the ELAINE JONES safely navigated St. Louis Harbor with mixed tows of both greater and lesser size. Moreover, Captain Stroschein had navigated St. Louis Harbor, down bound, prior to this voyage and had encountered the aforementioned left hand set but failed to communicate this knowledge to pilot Griffith.

ARGUMENTS IN OPPOSITION TO CANAL BARGE COMPANY'S PETITION FOR WRIT OF CERTIORARI

I.

Does The Jones Act And/Or Recovery Under The General Maritime Law Require That Loss Of Future Earnings Calculations Include A Deduction For Future Income Tax Liability?

The District Court found that Griffith had a stable and regular employment as a river pilot, and in the last year of his life his earnings, projected over a twelve-month period, amounted to $11,321.00. While the Court discounted loss of future earnings at a rate of 4%, it did not attempt to calculate the amount of income taxes which Griffith might have paid on such future earnings. The District Court also concluded that Griffith might have reasonably anticipated certain increases in his future earnings and stated that such increases might fairly be calculated at the rate of 2% per year to the end of his work-life expectancy, which the court also discounted at 4%.

On appeal, the Fifth Circuit Court of Appeals, predicated on its opinion in *Johnson v. Penrod Drilling Company*, supra, reversed the Trial Court with respect to the 2% increase in future earnings, stating that the influence of possible inflation or deflation on future damages is too speculative a matter for a judicial determination. However, with respect to the Trial Court's assessment of damages for loss of future earnings without an attempt to calculate possible future income taxes, the Court of Appeals affirmed, stating that:

> "No deduction for income taxes should be made where annual estimated earnings are not clearly above the reach of the middle income scale. *Blue v. Western Ry.*, 469 F.2d 487, 492-96 (5th Cir. 1972), petition for cert. filed, 41 U.S.L.W. 3393 (Jan. 10, 1973), (No. 72-972); *In re Marina Mercante Nicaraguense, S.A.*, 364 F.2d 118 (2d Cir. 1966), cert. denied, 385 U.S. 1005, 17 L.Ed. 2d 544 (1967); *McWeeny v. New York, N. H. & H. R. R.*, 282 F.2d 34 (2d Cir.) (en banc), cert. denied, 364 U.S. 870, 5 L.Ed. 2d 93 (1960).

The rationale surrounding the disallowance of a deduction of decedent's present and future income tax liabilities, where calculated future earnings do not surpass the middle income scale, lies embedded in judicial cognizance of the speculative character of future tax liability, which is partially predicated on the number of dependent exemptions allowed the wage earner, as well as other exemptions and deductions allowed under the Internal Revenue Code. Further considerations, such as plaintiff's undercompensation for loss of earning power and attorney's fees, which are almost always high in this type of litigation, have been recognized. *McWeeney v. New York, N.H. & H.R.R. Company*, supra; *Petition of Marina Mercante Nicaraguense, S.A.*, supra; *Cox v. Northwest Airlines, Inc.*, 379 F.2d 893 (7th Cir. 1968); *Blue v. Western Ry.*, supra; *Higginbotham v. Mobil Oil Corporation*, 360 F. Supp. 1140 (W.D. La. 1973).

The judicial terminology, i.e., "middle income scale", although incapable of any precise designation, is yet intended to be sufficiently flexible in order to

allow moderate fluctuation dependent upon the customarily accepted socio-economic standards of income. Since no precise line may be drawn, the trial court should be afforded wide latitude in assessing what is within the middle income reach. *Montellier v. United States*, 315 F.2d 180 (2nd Cir. 1964). When working with such imprecise and speculative considerations, the ultimate goal is reasonableness. *United States v. Summers*, 351 F.2d 354 (10th Cir. 1964).

Petitioner, Canal Barge Company, asserts that the consideration of income taxes in the calculation of future damages in some cases and not in others is in derogation of the due process clauses of the Fifth Amendment and the equal protection concept embodied therein, but cites no authorities for this proposition. To the contrary, it is submitted that there is a logical and rational classification on the basis of the extent of the tax liability, i.e., increased certainty regarding income tax liability among those above the middle income reach. In other words, in those instances where the income of the deceased is so large that the tax factor would constitute a very significant reduction, then it would be logical to attach some weight to this realization but at the same time ignore it, or at least give it minimal consideration, in those instances in which the tax liability is small by comparison. Moreover, since the ultimate goal is one of reasonableness in an area fraught with speculation, such classification eliminates an area of uncertainty and scarcely amounts to an arbitrary and unreasonable classification in violation of the Fifth Amendment.

Canal Barge Company cites the case of *Simpson v. Knutsen*, 444 F.2d 523 (9th Cir. 1971), for the proposition that the Ninth Circuit requires a deduction of income taxes. However, the Court in *Simpson* simply remanded the matter for a "reconsideration" of the issue in the light of *Moragne v. States Marine Lines, Inc.*, 398 U.S. 357, 90 S.Ct. 1772, 26 L.Ed.2d 339 (1970), without any suggestion whatsoever as to what rule it would ultimately adopt.

The Third Circuit case cited by applicant, *Domeracki v. Humble Oil & Refining Company*, 443 F.2d 1245 (3rd Cir. 1971), is not actually concerned with the issue before the Court *sub judice*. The Court in *Domeracki* was merely concerned with whether or not a jury should have been given an instruction that awards in personal injury actions are not subject to federal income taxes. Closer to the point at issue here was the following language of the Court:

> "Nevertheless, in the three states and one territory of this Circuit, as in most jurisdictions, the courts hold that the gross earnings of the plaintiff, rather than net earnings after taxes, are admissible as evidence for the jury's consideration in calculating this item of damages. (P. 1250).

It is respectfully submitted, therefore, that the authorities cited by Canal Barge Company hardly fashion a rule in the Ninth and Third Circuits contrary to the time-tested policy as set out in *McWeeny*, supra.

Finally, we might point out that this very same issue has on numerous occasions been made the basis of a

Petition for Writ of Certiorari and this Honorable Court has denied same. *B[illegible]e v. Western Ry.*, supra; *In Re: Marina Mercante Nicaraguense, S.A.*, supra; and *McWeeny v. New York, N.H. & H.R.R.*, supra.

II.

Does McAlister v. U.S. Require The Appellate Court To Affirm Lower Court Findings Of Fact Even Though They Are Not Supported By The Evidence In The Record?

This alleged statement of the issue by petitioner is not the issue at all. Of course, the answer to the question as stated by petitioner is in the negative. However, the real issue, properly framed is: Were the lower court's findings of fact supported by the evidence? To this, the answer is a resounding affirmative. The record is replete with evidence which supports the lower court's findings of negligence with respect to Canal Barge Company, Inc., by reason of both the negligence of Captain Stroschein and the negligence of Canal's Port Captain, Earl Ray Daily. For example, when the tow was made up at Wood River, Illinois, Captain Stroschein was on watch and Griffith did not participate in its arrangement. Griffith did not take the controls until the vessel was in the lock at 11:45 a.m., at which time Griffith inquired about idiosyncrasies of the tow's makeup. Stroschein knew it would take Griffith a period of some minutes after the vessel got under way at full speed to get a feel of the tow. Stroschein was also aware from his own experience that a "left set" just above the Veterans Bridge might be encountered in extremely high water and the force of the cross-current could slide a tow

toward the Illinois shore. He also knew that a downbound vessel and her tow had to be shaped up for safe passage beneath the Veterans and Eads Bridges at least one-half mile north of Veterans Bridge. He further knew that if at that point the flotilla was too far from the Missouri shore, navigation ahead would be imperilled by the limited clearance afforded by the arches of the Eads Bridge in high water, which necessitated passage directly under the middle of the center span of Eads Bridge. Pilot Griffith, on the other hand, did not know of the left-hand set to be encountered directly above the Veterans Bridge, nor was he apprised of its probable existence by Captain Stroschein or Canal's other supervisory personnel. Moreover, when he assumed control at Lock 27, he had inadequate time to get the feel of the tow or otherwise check its steerage before getting too wide in the navigation course, and without warning, he held to that course until the set slid the flotilla to port. Earl Ray Daily, Canal's Port Captain, knew that whenever the river stage at St. Louis Harbor exceeded twenty-two feet, the left set above the Veterans Bridge should be expected and, given that condition, a vessel descending too wide from the Missouri shore would have trouble shaping up to run the bridges.

Although Captain Daily was in twice-daily communication with the ELAINE JONES and was fully aware of her movements and flood conditions existing at the time, he issued no particular instructions to Stroschein or Griffith for navigating the harbor. As the District Court stated, "Canal, through its Port Captain, had privity or knowledge of the navigational hazards in St. Louis Harbor. . ."

It is submitted that the testimony of the expert Leonard W. Thompson would, standing alone, constitute sufficient evidence for the application of the "not clearly erroneous rule" adopted by the Court of Appeals, without reference to the body of additional evidence in the record to support the findings of negligence and unseaworthiness with respect to Canal Barge Company and the ELAINE JONES.

III.

Does Maritime Law Permit The Owner Of A Towboat To Recover Indemnity Or Contribution From The Pilot's Heirs For Damages Caused In A Collision Resulting From The Pilot's Negligence?

This is the issue as framed by Canal Barge Company. However, we also hasten to emphasize that while the Court of Appeals found negligence on the part of pilot Griffith, the liability of Canal Barge Company to the bridge owner was not predicated solely upon this negligence. The Court found numerous acts of negligence on the part of Canal Barge Company by reason of the negligence of Captain Stroschein and of its Port Captain, Earl Ray Daily. Thus, liability of Canal Barge Company necessarily followed, absent any findings of negligence on the part of Griffith. Further, it could not be said that Mr. Griffith's negligence was any more active than was the negligence of Canal Barge Company, Inc. by reason of the actions of its agents and employees other than Griffith. To the contrary, the Appellate Court found negligence on the part of Griffith predicated on constructive knowledge chargeable to him as a matter of

law. To the Court his negligence was generated by his failing to apprise himself of the navigational hazards to which his tow was exposed. By comparison with the negligence of the other agents and employees of Canal Barge Company, the so-called negligence of Griffith would appear to be much more "passive" in nature.

Also, it would be a strange rule indeed for the widow's award to be reduced by the comparative negligence of her deceased husband and then take the balance from her as a contribution to the negligent employer in connection with a claim for property damages resulting from the same accident. The inequity of such a result was correctly analyzed by the erudite Judge Rubin of the U.S. District Court for the Eastern District of Louisiana in *Shiver v. Burnside Terminal Company*, 392 F. Supp. 1078 (1975), wherein the Court spoke to this issue as follows:

> "In short, there is no way in which Getco can recover over against Shiver; to permit such a recovery would be twice to count his contributory negligence."

IV.

Do The Heirs Of A Seaman Have A Right To Recover From The Vessel Owner When The Vessel Was Rendered Unseaworthy By The Presence Of The Decedent Seaman Aboard The Vessel?

Here again, Canal Barge Company has phrased the issue in such a manner as to invite a favorable response. The District Court found that the pilot *and*

master of the ELAINE JONES were unfit to meet the perils reasonably to be anticipated in her voyage through St. Louis Harbor and that the pilot *and* master were unequal in disposition and seamanship to the ordinary man in the calling under like circumstances. This, the Court concluded, citing numerous authorities, rendered the vessel unseaworthy. Thus, it was not only a lack of knowledge on the part of Griffith which caused the vessel to be unseaworthy, but the inadequacies of her master, Stroschein, as well. The Fifth Circuit Court of Appeals held that under the plainly erroneous rule, the findings with respect to unseaworthiness were to be affirmed. Additionally, it should be noted that Griffith never held himself out as having knowledge of the peculiar navigational hazards existing at this particular place and only at certain times. This information was peculiarly within the knowledge of his employer, Canal Barge Company.

Moreover, the continuing operational negligence of the master of a vessel, standing in the shoes of the owner thereof, renders a vessel unseaworthy. *Mahnick v. Southern S.S. Co.*, 321 U.S. 96, 64 S.Ct. 455, 1944 A.M.C. 1 (1944); *Antoine v. Lake Charles Stevedores, Inc.*, 376 F.2d 433 (5th Cir. 1967), cert. den. 389 U.S. 869, 88 S.Ct. 145, 19 L.Ed.2d 146 (1967); *Robichaux v. Kerr, McGee Oil Industries*, 376 F.2d 447 (5th Cir. 1967); *Taylor v. S.S. Helen Lykes*, 268 F. Supp. 932, aff. 402 F.2d 777 (5th Cir. 1968); *Grigsby v. Coastal Marine Service of Texas, Inc.*, 412 F.2d 1011 (5th Cir. 1969), cert. den. 396 U.S. 1033; *Usner v. Lukenbach Overseas Corp.*, 400 U.S. 494, 91 S.Ct. 514 (1970).

Let us suppose that Canal Barge Company had placed the cook at the wheel of the ELAINE JONES. Surely it could not be argued that Canal Barge would then be in a position to obtain indemnity or contribution from the cook because he did not know of the existence of the peculiar situation existing at St. Louis Harbor. Granted, George Griffith was not a cook but an experienced and able mariner. His failing, if it could be classed as such, was simple ignorance of an existing fact or condition, of which his employer had superior knowledge, which knowledge the employer did not communicate to him. Even assuming, arguendo, that the sole basis of unseaworthiness was the lack of knowledge of the pilot Griffith, this would not defeat his widow's cause of action. The role played in this calamity by the pilot Griffith need only stand the test of a comparative negligence evaluation. It is further submitted that the M/V ELAINE JONES was rendered unseaworthy by the abandonment of the wheelhouse by her master, Vernon E. Stroschein, while the vessel was navigating perilous waters. By Stroschein's own admission, while he was abandoning the wheelhouse to seek a position of safety, Griffith remained and took action which avoided a more serious collision between the ELAINE JONES and the bridge, thereby saving the vessel and crew.

V.

Should Seaman's Heirs' Right To Recovery Of Damages For Seaman's Death Include Damage For Loss Of Society?

Another closely related issue asserted by petitioner Canal Barge Company is the following:

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Did Congress enacting the Jones Act in 1920 preempt the field in providing for recovery of damages in death actions of seamen which would prohibit application of *Moragne v. States Marine Lines type of recovery*?

Petitioner Canal Barge argues that the holding of unseaworthiness on the part of the Trial Court and its affirmation by the Court of Appeals is unsupportable and that, therefore, the claim of the Griffith heirs is limited to a Jones Act claim and, a fortiori, limited to pecuniary loss only. We first answer the argument of Canal Barge by strenuously denying that the holding of unseaworthiness is unsupportable, as more fully discussed hereinabove. There is ample support for the finding of unseaworthiness and, therefore, there can be no question but that there is recovery herein under the general maritime law, which includes all of the elements of damages set forth in *Moragne v. States Marine Lines*, supra. One of the primary reasons underlying the *Moragne* decision was the need for uniformity in admiralty death actions. Now petitioner would have the Court revert back to an absence of uniformity by declaring that the heirs of a *bona fide* seaman have less rights than the heirs of a *Sieracki*-type seaman. The *raison d'etre* of *Seas Shipping Company v. Sieracki*, 328 U.S. 85, 66 S.Ct. 872, 90 L.Ed. 1099 (1946) was to place shoreside workers who were exposed to the same dangers as seamen in the same position with respect to rights of recovery for personal injury and death, not in a preferred position. Whatever may have been the rule in 1920 at the time of the passage of the Jones Act (46 U.S.C. § 688), the Courts in recent years have allowed recovery by *Sieracki* seamen against vessel owners based on either unseaworthi-

ness or negligence. See for example: *Pope & Talbot, Inc. v. Hawn*, 346 U.S. 406, 74 S.Ct. 202, 1954 A.M.C. 1 (1953); *Boudoin v. Lykes Brothers S.S. Co., Inc.*, 348 U.S. 336, 75 S.Ct. 382, 1955 A.M.C. 488 (1955); *Copeland v. Oil Transport, Inc.*, 362 F. Supp. 11 (S.D. Ala. 1973). Also, the Court will note at 28 F.R.D. 541, Civil Charges 16.06 and 16.07, which are approved jury charges relating to negligence of the vessel owner. It is clear that *Sieracki* seamen had a cause of action under the general maritime law based on a maritime tort, which action has now been reduced to statutory form in the 1972 amendments to the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. § 905. Of course, prior to the decisions of this Honorable Court in *Moragne*, supra, and in *Sea-Land Services, Inc. v. Gaudet*, 414 U.S. 573, 94 S.Ct. 806, 1973 A.M.C. 2572 (1974), there was no need to draw a distinction between a seaman's cause of action predicated upon negligence under the Jones Act as opposed to the general maritime law. In a personal injury case, there was no need for him to proceed on a negligence basis under the general maritime law, since he had such a cause of action under the Jones Act. On the other hand, in death cases, in the pre-*Moragne* era, since it was thought that the maritime law provided no nonstatutory wrongful death action, the heirs of the deceased seaman had no basis for proceeding under the general maritime law. However, commensurate with the *Moragne* and *Gaudet* decisions, it is indeed to the interests of the heirs of the deceased seaman that they proceed with their negligence cause of action under the general maritime law which, under *Gaudet*, allows a broader recovery than does the Jones Act. To the extent that *Gillespie v. United States Steel Corporation*,

379 U.S. 148, 85 S.Ct. 308, 13 L.Ed.2d 199 (1964) conflicts with *Moragne*, it has been impliedly, if not expressly, overruled. Footnote 12 of the *Moragne* decision states:

> "Likewise, the remedy under general maritime law that will be made available by our overruling today of *The Harrisburg* seems to be beyond the preclusive effect of the Jones Act as interpreted in *Gillespie*. The existence of a maritime remedy for deaths of seamen in territorial waters will further, rather than hinder, "uniformity in the exercise of admiralty jurisdiction"; and, of course, no question of preclusion of a *federal* remedy was before the Court in *Gillespie* or its predecessor, *Lindgren v. United States*, 281 U.S. 38, 50 S.Ct. 207, 74 L.Ed. 686 (1930), since no such remedy was thought to exist at the time those cases were decided."

There is absolutely nothing in the *Moragne* opinion, or in *Gaudet* for that matter, to indicate that this Honorable Court intended the absurd result espoused by petitioner, Canal Barge Company. To confer upon the heirs of *Sieracki* seamen or of passengers aboard vessels, who also enjoy a negligence cause of action, greater rights than the heirs of seamen, would place the maritime law back into the same morass from which it was extricated by this Honorable Court in *Moragne* and *Gaudet*. This Court also stated in *Moragne:*

> "Our recognition of a right to recover for wrongful death under general maritime law will assure uniform vindication of federal policies, removing the tensions and discrepancies that have resulted from the necessity to accommodate remedial statutes to exclusively maritime substantive concepts . . . such uniformity not only will further the concerns of both of the 1920 Acts but also will give effect to the constitutionally based principle that federal admiralty law should be "a system of law coextensive with, and operating uniformly in, the whole country." (90 S.Ct. at p. 1788).

The following excerpt from the *Sea Gull*, 21 Fed. Cas. 909, quoted in *Moragne*, 398 U.S. 387, 90 S.Ct. at 1781 is pertinent here:

> "Certainly it better becomes the humane and liberal character of proceedings in admiralty to give than to withhold the remedy, when not required to withhold it by established and inflexible rules."

There is simply no logical reason for withholding from the heirs of the seaman damages for "loss of society" as that term is defined in *Gaudet*.

CONCLUSION

In view of the foregoing arguments and authorities, it is respectfully submitted that petitioner, Canal Barge Company, Inc's., Application for Writ of Certiorari should be denied based upon the following grounds:

A. The jurisprudence initiated by *McWeeny v. New York, N.H. & H.R.R. Company*, supra, and followed by a majority of jurisdictions, proscribes any deduction for income taxes where the annual estimated earnings of decedent are not clearly above the reach of the middle income scale. Accordingly, no deduction for future income tax liability of George L. Griffith is warranted herein.

B. The substantial evidence received in this case ably supports the Trial Court's findings of negligence with respect to Canal Barge Company, Inc. Further, the record of this action clearly indicates that pilot Griffith executed the duties of his employment in a careful and prudent manner in accordance with the dictates of his profession.

C. The general maritime law does not recognize the employer's right of indemnity, for property damages, against the estate of the deceased seaman, for, to do so, would effectively permit the employer's total recovery, via comparative negligence and indemnity, due to the deceased's negligence.

D. The Appellate Court's affirmance of the Trial Court's findings of unseaworthiness was eminently correct since the only information regarding the hazardous con-

ditions existing in the St. Louis Harbor was peculiarly within the knowledge of pilot Griffith's employer, Canal Barge Company, Inc.

E. Recovery by the heirs of seamen include damages for loss of society as that term is defined in *Gaudet*. To preclude such recovery would afford heirs of nonseamen greater rights than the heirs of seamen, thus commencing greater anomalies than those proscribed by *Moragne*.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that true copies of the foregoing Brief in Opposition to Petition for Writ of Certiorari on behalf of Respondent, Mary Kathryn Griffith, have been served upon Robert B. Acomb, Jr., and Edith Brown Clement, by depositing same in United States Mail, postage prepaid, and properly addressed.

LAKE CHARLES, LOUISIANA, this ____ day of September, 1975.

HARRY E. BARSH, JR.